87-1653

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No.

JOHN R. VARNEY and
ROBERT J. HUGHES, JR.,

Appellants,

vs.

THE FLORIDA BAR, et al.,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

JURISDICTIONAL STATEMENT - STATE CIVIL CASE

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March 16, 1988

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QUESTIONS PRESENTED

Did the Florida Supreme Court err in holding that the principle of "one-person, one-vote" does not apply to elections to the Florida Bar Board of Governors?

If the principle of "one-person, one-vote" is applicable to election of the Florida Bar Board of Governors, is that principle equally applicable of nonresident active members of the Florida Bar as well as resident active members of the Florida Bar?

PARTIES TO THE PROCEEDING

The parties to the proceedings below in the Supreme Court of Florida include:

As Petitioners below in the Florida Supreme Court and as Appellees herein, Rodney Anderson, Timothy A. Andreu, Fernando S. Aran, Jose I. Astigarraga, John Calhoun Bales, R. J. Beckham, Thomas B. Bourque, C. Robert Burns, Michael B. Chavies, Robert F. Clark, John J. Copelan, Jr., Alvin B. Davis, Norman Davis, Luia A. Dougherty, Ronald Dresnick, Thomas V. Eagan, Alan C. Espy, David S. Felman, Leon M. Firtel, P. Campbell Ford, Richard E. Gerstein, Robert C. Gross, Albert J. Hadeed, Larry R. Handfield, Gerald J. Houlihan, Richard Jacobson, A. Quinn Jones, III, Christian D. Keedy, Linda G. Kelly, Joseph P. Klock, Jr., George F. Knox, Peter M. Kramer, Stephen Le Clainche, Mark L. Logan, Thomas S. Martino, Thomas W. McAliley, Vincent P. McGhee, William A. Meadows, Jr., Brooks C. Miller, Jeffrey I. Mullens, Noel Nation, John Neukamm, Edward O'Donnell, James L. Olivier, Craig Olmstead, Richard A. Pettigrew, Mike Piscitelli, Clinton J. Pitts, Paul Pollack, Paul M. Rashkind, Michael L. Rosen, Andrew Rosenblatt, Betsy L. Ruff, Dennis Scholl, Patricia A. Seitz, James H. Shimberg, Jr., Jodi Siegel, Chesterfield Smith, John Edward Smith, Rafael Suarez-Rivas, Mark E. Timmes, Rodney Earl Walton, Mary B. Weigly, Edward N. Winitz, Burton Young.

As Respondent below in the Florida Supreme Court and Appellee herein, the Florida Bar,

As Intervenors supporting the Petitioners below in the Florida Supreme Court and as Appellants herein, John R. Varney and Robert J. Hughes,

As Intervenors supporting Petitioners below in the Florida Supreme Court and as Appellees herein, Talbot D'Alemberte, and Henry H. Harnage, and

As Intervenor supporting the Florida Bar below in the Florida Supreme Court and as Appellee herein, Thomas M. Ervin, Jr.

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ON APPEAL FROM THE SUPREME COURT OF FLORIDA

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Supreme Court of Florida entered December 10, 1987 and the decision of the Supreme Court of Florida on motion for clarification entered December 17, 1987, which appear in the Appendix page A-1, *infra,* are reported at —, Fla. —, 518 So.2d 251 (1987).

JURISDICTION

The Order of the Supreme Court of Florida denying Appellants' Federal Constitutional Challenge, on Equal Protection grounds, to the apportionment of the membership of the Florida Bar Board of Governors, set forth at West's F.S.A. Rules Regulating the Florida Bar §§1-4.1 and 2-3.3, was entered on December 10, 1987. Thereafter, a motion for clarification of the decision of the Supreme Court of Florida entered December 10, 1987 was made by The Florida Bar and the Order of the Supreme Court of Florida granting the motion for clarification was entered on December 17, 1987. A Notice of Appeal to this Court was timely filed in the Supreme Court of Florida on March 15, 1988.

This Appeal is being docketed in this Court within ninety (90) days of the entry of the Order on the motion for clarification below. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2). *See Ohralik v. Ohio State Bar Ass'n.*, 436 U.S. 447, 98 S. Ct. 1912 (1978); *In re Primus*, 436 U.S. 412, 98 S. Ct. 1893 (1978); *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S. Ct. 2691 (1977).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONSTITUTION AMENDMENT XIV

CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

SECTION 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

35 West's F.S.A., Rules Regulating the Florida Bar

1.4.1 Composition of board of governors

The board of governors shall be the governing body of The Florida Bar. It shall consist of the president and the president-elect of The Florida Bar, president and president-elect of the Young Lawyers Division, two (2) representatives

of the active members of the Florida Bar residing outside of the State of Florida, representatives elected by and from the active members of The Florida Bar in each judicial circuit, and two (2) residents of the State of Florida who are not members of The Florida Bar. There shall be one such circuit representative from each judicial circuit and fourteen (14) additional circuit representatives who shall be apportioned among and elected from the judicial circuits on the basis of the number of members in good standing residing in each circuit. The formula for determining the number of additional circuit representatives apportioned to and elected from each judicial circuit and all other matters concerning election and term of office for members of the board of governors shall be prescribed in chapter 2.

2-3.3 Formula for apportionment of members of board of governors

The formula for determining the number of representatives apportioned to and elected from each judicial circuit shall be: determine the average number of members in good standing residing in each judicial circuit by dividing the number of Florida resident members in good standing by the total number of judicial circuits and then divide the members in good standing residing in each circuit by such average. Apportionment of representatives among the judicial circuits shall be in accordance with the results thus obtained by apportioning each judicial circuit one representative for each multiple of one (including one) of the results obtained for such circuit, provided such number does not exceed fourteen (14), and one representative for the circuit's remaining fraction of a multiple commencing with the largest such fraction and continuing in descending order to the next largest fraction and so on until all representatives of this category shall be apportioned to judicial circuits. In the event the sum of the whole integers so determined exceeds fourteen (14), the circuits whose results show whole integers from the ap-

plication of the formula shall be determined by eliminating one representative for the lowest fraction of a whole integer among such circuits and continuing in ascending order until fourteen (14) is reached.

STATEMENT OF THE CASE AND HOW THE FEDERAL QUESTION WAS RAISED

This proceeding was commenced in the Supreme Court of Florida, pursuant to its exclusive jurisdiction under Article V, Section 15 of the Florida Constitution, 26 West's F.S.A. Const. Art. 5, §15 (West's Supp 1987), to amend chapters 1 and 2 of the Rules Regulating the Florida Bar for the purpose of requiring that representatives on the Board of Governors of the Florida Bar be elected in accordance with the principle of "one-person, one-vote". Appellants, nonresident active members of the Florida Bar, moved to intervene in the proceeding on behalf of nonresident active members of the Florida Bar and that motion was granted by the Supreme Court Florida. Appellants sought to support Petitioner's argument before the Supreme Court of Florida and to extend the principal of "one-person, one-vote" to the election of representatives to the Florida Bar Board of Governors for non-resident active members of the Florida Bar.

At the time the proceeding was commenced, the membership of the board of Governors of the Florida Bar was set forth at 35 West's F.S.A. Rules Regulation the Florida Bar §1-4.1. The Board consists of the President and President-Elect of the Florida Bar; the President and President-Elect of the Young Lawyers section of the Florida Bar; twenty (20) circuit representatives; fourteen (14) additional circuit representatives allocated among the most populous circuits according to a formula set forth in 35 West's F.S.A. Rules Regulating the Florida Bar §2-3.3; two (2) nonresident members of the bar elected by nonresident bar members; and two (2)

Florida residents who are not lawyers who are appointed by the Supreme Court of Florida.

This procedure for the election of representatives to the Board of Governors of the Florida Bar results in the following misapportionment and dilution of the voting power of active members of the Florida Bar:

Resident Members

Circuit	Members	Reps.	Members Per Rep.
1st	629	1	629
2nd	1623	2	812
3rd	117	1	117
4th	1707	2	854
5th	458	1	458
6th	2021	2	1011
7th	705	1	705
8th	545	1	545
9th	1999	2	1000
10th	550	1	550
11th	8255	6	1376
12th	946	2	473
13th	2272	2	1136
14th	184	—	184
15th	2393	2	1197
16th	154	1	154
17th	3441	1	1147
18th	765	1	765
19th	501	1	501
20th	863	1	863
Total	30128	34	886 (average)
Nonresident Members	9673	2	4837
	39801	36	

Demonstratively, even within the resident members of the Florida Bar, there is a tremendous difference in actual

representation on the Board of Governors. More importantly, nonresident active members of the Florida Bar constitute 24% of the total bar membership (9,673 out of 39,801), but elect only 6% (2 of 36) of the elected members of the Board of Governors.*

In contrast, resident members constitute only 76% of the total membership of both resident and nonresident members of the Florida Bar (30,128 of 39,801) but elect 94% (34 of 36) of the elected representatives on the Board of Governors. Stated differently, there is one representative for each 4,837 nonresident active members of the Florida Bar as compared with an average of one representative for each 886 resident members of the Florida Bar, a percentage difference of 546%.

The Florida Bar opposed the arguments by the Petitioners-Appellees and Intervenors-Appellants that the current method of electing representatives to the Florida Bar Board of Governors violated the Equal Protection Clause of the United States Constitution (U.S. Const., Amendment XIV, §1), but proposed a modified plan which would retain at least one representative in each circuit of the State. The Florida Bar vigorously protested that the principle of one-person, one-vote does not apply to elections to the Florida Bar Board of Governors, although its proposal did add a third nonresident member representative on the Board of Governors.

In a Decision and Order dated and entered December 10, 1987, the Supreme Court of Florida rejected the Federal Constitutional challenge to the apportionment of the Florida Bar Board of Governors made by Petitioners-Appellees and Intervenor-Appellants and adopted the proposal of the Florida

---

* The Presidents and President-Elects of the Florida Bar and its Young Lawyers Section and the two nonlawyers on the Board are not elected.

Bar. In so doing, the Supreme Court of Florida held that "strict apportionment of board seats according to the principle or one-person, one-vote is [not] required". In addition the Supreme Court of Florida apparently ignored or misunderstood the arguments of Intervenors-Appellants insofar as it stated in its decision that "there are no objections to the board's proposal that a third-out-of-state representative be added".

In a dissenting opinion, Justice Barkett found that "[t]he principle of one-person, one-vote has become so firmly entrenched in this nation's idea of fair and representative governance that I see no reason why it should not be applied to The Florida Bar as a matter of policy".

On the Florida Bar's motion for clarification the Supreme Court of Florida, in a Decision and Order dated and entered December 17, 1987, clarified its earlier Decision and Order dated and entered December 10, 1987 by making minor changes in the time for filing nominating petitions for election to the Board of Governors and the years in which certain seats on the Board of Governors would be elected.

SUBSTANTIALITY OF THE QUESTIONS PRESENTED

Starting with the landmark decision in *Reynolds v. Sims*, 377 U.S. 533, 84 S. Ct. 1362 (1964), this Court has made clear in decision after decision that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction. Thus, in *Reynolds*, this Court applied the principle of "one-person, one-vote" to the apportionment of state legislatures and found that an individual is deprived of Equal Protection under the laws of the Fourteenth Amendment of the United States Constitution if his or her vote is impaired because its weight is substantially diluted when compared with the votes of

citizens living in other parts of the state. *Id.*., at 568, 84 S. Ct. at 1385.

Subsequent decisions of this court have defined the extent to which the principle of "one-person, one-vote" applies to other units of state and local government. Thus, although this court held in *Sailors v. Board of Education*, 387 U.S. 105, 87 S. Ct. 1549 (1967) that "one-person, one-vote" principles do not apply to local government bodies whose members are appointed, in *Avery v. Midland County,* 390 U.S. 474, 88 S. Ct. 1114 (1968), this Court made it clear that this principle does apply to elected units of local government that possess "general governmental powers over an entire geographic area". *Id.*, 390 U.S. at 484-486, 88 S. Ct. at 1120-1121.

Indeed, because the right to vote on an equal basis with other citizens is clearly fundamental as preservative of other basic civil and political rights, *see Reynolds v. Sims*, 377 U.S. at 562, 84 S. Ct. at 1381, *supra*, this Court has held in a related line of cases that any effort by state or local governments to limit the franchise to certain members of the public must be carefully and precisely tailored to effectuate a state's compelling interest in order to survive rigorous Equal Protection analysis. *See Kramer v. Union School District*, 395 U.S. 621, 89 S. Ct. 1886 (1969); *Cipriano v. City of Houma*, 395 U.S. 701, 89 S. Ct. 1897 (1969).

This Court's most important ruling on the application of "one-person, one-vote" principles to state and local governments was *Hadley v. Junior College District*, 397 U.S. 50, 90 S. Ct. 791 (1970). There, this Court first made it clear that the one-person, one-vote principles announced in *Avery* do not apply solely to entities such as county legislatures which exercise "general governmental powers". Instead, this Court found that a junior college district, within its own sphere, performed "important governmental functions" that

were "general enough and had sufficient impact throughout the district to justify the conclusion that the principles which we applied in *Avery* should also be applied here". *Id.*, 397 U.S. at 53-54, 90 S. Ct. at 793-794. The general rule established by this Court in *Hadley* and which should be applied to the apportionment of seats on the Board of Governors of the Florida Bar as follows:

> "Whenever a state or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election, and when members of an elected body are chosen from separate districts, each district must be established on a basis that will insure as far as is practicable, that equal numbers of voters can vote for proportionally equal numbers of officials".

Id., 397 U.S. at 56, 90 S. Ct. at 795.

In *Hadley,* this Court did carve out an exception to this rule for those situations in which a state "elects certain functionaries whose duties are so far removed from normal governmental activities *and* so disproportionately affect different groups that a popular election in compliance with *Reynolds, supra,* might not be required". *Id. (emphasis added).* This Court found that exception to be inapplicable in *Hadley,* inasmuch as education "has traditionally been a vital governmental function" and the junior college trustees "are governmental officials in every relevant sense of that term". *Id.*

In Salyer Land Co. v. Tulare Lake Basin Water Storage District, 410 U.S. 719, 93 S. Ct. 1224 (1973) and *Ball v. James*, 451 U.S. 355, 101 S. Ct. 1811 (1981), this Court applied

the exception set forth in the *Hadley* decision and held that one-person, one-vote did not apply to the election of Boards of Directors for water districts. In both cases, this Court concluded that the water districts at issue met both parts of the exception carved out in *Hadley*, but of particular importance were this Court's determinations that the water districts did not exercise what might be considered "normal governmental powers" such as education as in *Hadley*. *See Salyer Land Co. v. Tulare Lake Basin Water Storage District,* 410 U.S. at 728-729, 93 S. Ct. at 1229-1230, *supra; Ball v. James,* 451 U.S. at 368, 101 S. Ct. at 1819-1820, *supra.*

Application of these precedents to the method for electing representatives on the Board of Governors of the Florida Bar demonstrates that *Hadley* governs and that the current formula violates "one-person, one-vote" principles as amply demonstrated by the chart set forth earlier. This existing malapportionment cannot be preserved on the ground that the Board of Governors of the Florida Bar falls within the *Hadley* exception for "special purpose" elections such as those in *Salyer* and *Ball.* Although the *Hadley* exception contains two elements, both of which must be met for the exception to apply, it is obvious that the first part of the *Hadley* exception, that the entity at issue be "far removed from normal governmental activities", does not apply in this case.

By law, the Board of Governors is "an official arm" of the Supreme Court of Florida, *see* West's F.S.A. Rules Regulating the Florida Bar, chapter 1, and it exercises powers traditionally reserved to units of state governement. Regulation of the Bar has long been the responsibility of state government throughout the United States, and the Florida Constitution entrusts that power to the Supreme Court of

Florida. *See* West's F.S.A. Const. Art. 5, Section 15. The Florida Bar, and its Board of Governors, are unquestionably an entity of state government in Florida. As former Chief Justice Arthur J. England, Jr., of the Florida Supreme Court has stated, both the Florida Bar and the Florida Board of Bar Examiners "operate through boards. Both are responsible to the Supreme Court to carry out the court's directives". Fla. B.J., Vol. LV, No. 4, at 254 (April 1980). In fact, in a number of instances, the Florida Bar has sought and obtained exemptions from federal and state taxes on the grounds that the Bar is an administrative agency or unit of the judicial branch of state government. For example, the Florida Bar obtained a tax exemption for contributors to the construction of the Florida Bar Center in Tallahassee by persuading the Internal Revenue Service that the Bar was a political subdivision of the state that was organized exclusively for public purposes under §170(c) of the Internal Revenue Code. *See* Fla. B.J., Vol. LII, No. 1, at 570 (Nov. 1979).

Indeed, there can be no doubt that the Florida Bar through its Board of Governors exercises powers traditionally undertaken by state government. In 1982, then-Chief Justice Alan C. Sundberg of the Florida Supreme Court wrote:

> "Lawyers are different in the sense that they are officers of the court. They literally exercise some of the sovereignty of the State of Florida. An engineer cannot send a piece of paper out to someone demanding him to appear in a court room somewhere whether he wants to appear or not. It is our system.
>
> In other words, essentially the state has turned over to the lawyers of this state the whole machinery to administer justice, and while we [the Supreme Court] absolutely control the machinery, we have to be sure that everybody has access — everybody who is in need of it."

Fla. B.J., Vol. LVI, No. 2 at 128 (Feb. 1982).

As a general matter, the board of Governors of the Florida Bar is "vested with exclusive power and authority to formulate. fix, determine and adopt matters of policy concerning the activities, affairs or organization of The Florida Bar. 35 West's F.S.A. Rules Regulating the Florida Bar, §2-3.1. Further, the Board has the "duty and responsibility of enforcing and carrying into effect the provisions of the Rules Regulating The Florida Bar and the accomplishment of the aims and purposes of The Florida Bar" and enjoys "full power to exercise such functions as may be necessry, expedient, or incidental to the full exercise of any powers bestowed upon the board of governors". *Id.* More specifically, the Board of Governors has the power to: (1) levy dues and assessments as a condition of being licensed to practice one's profession in Florida and to suspend numbers from the practice of law if they fail to pay; (2) investigate charges of misconduct, supervise and conduct disciplinary hearings, and seek final disciplinary action from the Supreme Court of Florida; (3) investigate and prosecute non-criminal unauthorized practice of law charges; (4) oversee the regulation of lawyer advertising and specialization in Florida; (5) allocate a portion of lawyers' mandatory dues to a Clients' Security Fund, to administer that Fund, and to pay claims made upon it by members of the public; and (6) license applicants seeking to establish Group Legal Services Programs, the operation of which would otherwise be illegal in the State of Florida.

All of this demonstrates quite clearly that the Board of Governors of the Florida Bar exercises "normal governmental powers" within the meaning of this Court's decision in *Hadley,* and therefore the principle of "one-person, one-vote" should apply to election of the Board of Governors. Appellants recognize that such a conclusion would appear to be contrary to this Court's decision in *Sullivan v. Alabama State Bar,* 295 F. Supp. 1216 (M.D. Ala.) *aff'd mem.*, 394

U.S. 812, 89 nS. Ct. 1486 (1969). In *Sullivan*, this Court granted a motion to affirm an appeal taken from the decision of a three-judge District Court, ruling that the principle of one-person, one-vote was inapplicable to the Board of Commissioners of the Alabama State Bar. Appellants assert that there are three reasons why this proceeding challenging the apportionment of the Board of Governors of the Florida State Bar is not controlled by the decision in *Sullivan.*

First, *Sullivan* was not a direct challenge to the apportionment of the Alabama State Bar Board of Commissioners and it is unclear whether the District Court opinion necessarily relied on a determination that the principle of one-person, one-vote does not apply to the Board of Commissioners in rejecting Sullivan's attempt to avoid being disbared. In dismissing the complaint in *Sullivan*, the District Court questioned but did not explicitly rule on the plaintiff's standing. 295 F. Supp. at 1220, *supra.* The court also noted that the acts of the Board of Commissioners in the disbarment proceeding could be considered valid acts of a *de facto* authority even if it was malapportioned. *Id.*at 1222. Thus, this Court may well have affirmed on either of those bases, and not have considered the application of one-person, one-vote principles to the Alabama State Bar Board of Commissioners because a summary affirmance by this Court represents only an approval of the judgment below but is not to be taken as endorsement of the court below. *Mande. v. Bradley,* 432 U.S. 173, 97 S. Ct. 2238 (1977); *Fusari v. Steinberg,* 419 U.S. 379, 95 S. Ct. 553 (1975). Thus, it is not clear that this Court has resolved the issue presented on this appeal adversely to the appellants.

Second, decisions by this Court subsequent to the summary affirmance in *Sullivan* indicate a significant expansion of this Court's view of the application of the principle of one-person, one-vote to state and local government. *Sullivan* was affirmed by this Court after the *Avery* decision but

before this Court's decisions in *Kramer* and *Hadley*. Thus, at the time of the summary affirmance in *Sullivan*, the only ruling by this Court in this area held that one-person, one-vote principles applied to those "units of local governments exercising general governmental power", and this Court had not yet ruled on whether those principles also applied to more specialized units of government, such as the junior college district in *Hadley* or the school board in *Kramer*. In addition, in *Sullivan* the District Court relied on the fact that the disbarment powers of the State Bar were more judicial than legislative in nature. *See* 295 F. Supp. at 1222, *supra*. This "legislative/judicial" distinction was expressly rejected by this Court in *Hadley*. *See* 397 U.S. at 55-56, 90 S. Ct. at 795, *supra*. Therefore, this Court's most recent decisions on this issue reaffirm that *Sullivan* may not be binding precedent.

Third, there are important factual distinctions between *Sullivan* and this action. First, as pointed out earlier herein, the Florida Bar and its Board of Governors has specifically sought the benefits of being an official arm of the Supreme Court of Florida and thus a part of state government as a political subdivision of the State in order to acquire advantageous federal tax benefits. Under these circumstances, the Florida Bar and its Board of Governors has taken itself out of the *Hadley* exception to the application of one-person, one-vote and should not be heard to avoid the burdens that are associated with the benefits of being a political subdivision of the state. In addition, neither *Sullivan* nor *Brady v. State Bar of California*, 533 F.2d 502 (9th Cir. 1976), which relied on *Sullivan* in rejecting a one-person, one-vote challenge to the California Bar, specifically considered the significance of a unified or integrated bar system in relation to the apportionment of the governing body of the state bar organization. In the present case, the Florida Bar is a fully integrated Bar, meaning that in order to actively practice law in Florida, admitted lawyers, both resident and

nonresident alike, must become members of the Florida Bar and to sustain active membership in the Bar, and thus retain the right to practice law in Florida, resident and nonresident lawyers must pay identical annual membership dues. *See* 35 West's F.S.A. Rules Regulating the Florida Bar, §§1-3.1, 1-3.2(a).

Under the system of disproportionate representation presently in effect in the Florida Bar, actions taken by the Board of Governors may not fully represent the view of either resident or nonresident members of the Bar. Appellants submit that the current system of malapportionment of the Board of Governors not only denies many resident members the opportunity to have their votes counted equally, but also dilutes the votes of active nonresident members to such an extent that their votes on important issues affecting all members of the Bar are virtually meaningless.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction of this appeal. If, however, it is concluded that probable jurisdiction is wanting, Appellants respectfully request this Court to consider this Jurisdictional Statement as a Petition for Certiorari and to grant the Petition for the reasons stated herein.

Respectfully submitted,

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Supreme Court of Florida

CORRECTED OPINION

No. 69,805

The Florida Bar re Amendments to the Rules Regulating the Florida Bar (Reapportionment).

[December 10, 1987]

PER CURIAM.

Numerous members of the Florida Bar have petitioned this Court to amend the Rules Regulating the Florida Bar and change the apportionment of the seats on the bar's board of governors. The board of governors has responded with an alternative proposal for reapportioning the board. We have jurisdiction pursuant to rule 1-12.1.

The board currently has forty-two members: the president and president-elect of the Florida Bar; the president and president-elect of the Young Lawyers Division (YLD); two bar members who reside outside Florida; two nonlawyers; one bar member from each of the state's twenty judicial circuits; and fourteen additional bar members apportioned among the circuits based on the number of bar members residing in each circuit. The petitioners' proposal would retain the bar's president and president-elect, the two nonresident bar members, and the two nonlawyers and would have between thirty and forty resident bar members elected from single-member districts created by the board of governors. The proposal eliminates the two YLD representatives and requires that the thirty to forty resident bar members be

elected according to the one person, one vote principle. Two out-of-state bar members argue that there should be more nonresident bar members on the board, but otherwise support the petitioners' proposal as to one person, one vote and abolishing the YLD seats. An individual member of the bar endorsed the petitioners' proposal, but argues for a "free choice" reapportionment plan which would allocate board seats on a special interest basis.

In opposition to the petitioners' proposasl the board of governors adopted an alternative plan for reapportioning the board. The board's proposal keeps the two bar officers, the two YLD representatives, the two nonlawyers, and the twenty circuit representatives, adds a third nonresident bar member, and, using a median circuit bar member population, apportions the remaining seats on the board (for a total board membership of up to fifty) among the circuits based on the median number of resident bar members per circuit. The board argues that the one person, one vote principle is not applicable to the bar, that the YLD representatives should be retained, and that there should continue to be at least one board member from each judicial circuit. The YLD supports the board's proposal. An individual bar member, who agrees with most of the board's proposal, has submitted an alternative method of allocating board seats based on the average, rather than the median, number of bar members per circuit.

The main issue presented here is whether the one person, one vote principle applies to board of governors' elections. In *Reynolds v. Sims*, 377 U.S. 533 (1964), the United States Supreme Court held that state legislatures must be apportioned according to the principle of one person, one vote. Since *Reynolds*, the Court has found that standard applicable to other elective bodies that perform vital and traditional governmental functions and whose actions affect all the general public within those bodies' jurisdiction. *E.g.*,

Hadley v. Junior College District, 397 U.S. 50 (1970) (trustees of junior college district); *Kramer v. Union Free School District*, 395 U.S. 621 (1969) (school district officials); *Avery v. Midlane County,* 390 U.S. 474 (1968) (county commissioners). If an elective body's powers are limited and disproportionately affect members of a particular group, however, the Court has found the one person, one vote principle inapplicable. *E.g., Ball v. James*, 451 U.S. 355 (1981) (directors of agricultural improvement district); *Salyer Land Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973) (water storage district directors).

The Florida Bar currently has approximately 40,000 members; their interests and concerns are diverse. The board of governors looks after those interests and addresses those concerns on a collective basis, working for the good of the profession as a whole. The board should be apportioned fairly and should represent all of the bar's members. We do not find, however, that strict apportionment of board seats according to the principle of one person, one vote is required.

The Petitioners argue that lawyers control the administration of justice in Florida, and, because it controls lawyers, the board exercises powers traditionally undertaken by state government. The board exercises the powers and performs the duties assigned to it by this Court. Some of those powers and duties are broad, and the board has considerable influence on the legal profession. It does not, however, exercise governmental powers as, for instance, a legislature does.

The bar, as governed by the board, is composed of lawyers and exists to inculcate in its members the principles of duty and service to the public, to improve the administration of justice, and to advance the science of jurisprudence. Although our profession deals with the general population, and that population is affected by the actions of lawyers,

the board of governors has little to do with the general public and is not responsible to the population as a whole in the way that a government usually is. Rather, its powers and duties are limited and directly affect members of a particular group, i.e., persons licensed to practice law in this state.

When it integrated the state bar, this Court noted that integration resulted from the need for an organization that would speak for the profession as a whole and described the integrated bar as a necessary union "to secure the composite judgment of the bar on questions involving its duty to the professsion and the public". *Florida State Bar Association,* 40 So.2d 902, 908 (Fla. 1949). Morever, the court stated that integration was not "intended as a means to aid groups and cliques in the exercise of arbitrary power or to enforce their will on others." *Id.* The first paragraph of article III of the original integration rule, therefore, provided for the following board members: the president and president-elect of the bar, the president of the junior bar section (the YLD's predecessor), one bar member from each judicial circuit, and an unspecified nunber of board members from circuits with more than 300 bar members up to a limit of three representatives from any one circuit. Presumbly, the original apportionment plan implemented the court's stated aims of gaining the bar's composite judgment and preventing its being run by a clique.

Those aims are still valid, and we find that the board's proposal, rather than the petitioners', more nearly carries out those aims.★ The state's judicial system is based

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★ In fact the petitioners' plan could well contravene the Court's aims completely by concentrating all or virtually all the board members in a few geographical locations that have large numbers of resident bar members, leaving other areas unrepresented.

on the circuits. Circuit representatives, therefore, can keep the board abrest of the needs, problems, and characteristics that are unique to their circuirs. Additionally, the representatives of the smaller, ususally rural circuits, may bring a pont of view to the board that is absent in larger urban circuits. In sum it appears that the board will be more representative of all the bar's members if the principle of one-person, one-vote is not employed.

The same is true for young lawyers' representation on the board. Approximately half of the state's bar members are also members of the YLD by virtue of their being less than thirty-six years old or their having been licensed to practice law in any jurisdiction for less than five years. The petitioners argue that allowing the YLD representatives on the board while YLD members can vote for circuit representatives gives disproportionate weight to YLD members' votes. The YLD responds that, due to the realities of practicing law, generally only older, more established members of the profession have the time and resources to run for and serve on the board of governors. According to the YLD, therefore, removing the YLD representatives from the board would virtually disenfranchise the YLD members because no board member would be directly concerned with their interests.

We do not believe that the interests of older bar members are antithetical to those of younger members; as bar members they must have many areas of concern in common. The presence of YLD representatives on the board, however, might well allow the introduction of a different point of view, a valuable consideration for a group that acts for the bar as a whole. Because the president-elect succeeds the president in YLD, each of these YLD officeholders serves two years on the board, thereby increasing their familiarity with the board's work and their effectiveness on the board. We agree to the board's proposed retention of both the YLD president and president-elect. We do not find that both YLD officers need to be voting board members, however, and amend the

proposal to give one vote to the two YLD members, to be exercised by the YLD president or by the YLD president-elect in the president's absence.

There are no objections to the board's proposal that a third out-of-state representative be added. Therefore, we hereby allow for three (rather than the current two) nonresident board seats.

The board's proposal caps the total number of seats at fifty as the maximum number at which the board can operate effectively. To maximize the number of board seats assigned on a population of bar members basis, however, we increase that number to fifty-one, only fifty of whom will be voting members. The board, therefore, shall consist of the bar's president and president-elect, two YLD members, three nonresident bar members, two nonlawyers, one representative from each of the twenty judicial circuits, and twenty-two members apportioned among the circuits on the basis of the number of bar members residing in each circuit. As in the current apportionment plan, this amendment insures that each circuit will have at least one representative while other circuits will have many more than one. Instead of the current fourteen extra representatives, however, there will now be twenty-two board seats assigned among the circuits on a population of bar members basis. We trust this will provide more representation for the circuits with the largest number of bar members while still allowing the fairest representation of bar members across the state and beyond.

Rule 1-4.1 and 2-3.3, as amended herein, are attached following this opinion. These amendments will be effective at 12:01 a.m., January 1, 1988

It is so ordered.

McDONALD, C.J., and OVERTON, EHRLICH, SHAW, GRIMES AND KOGAN, JJ., Concur.
BARKETT, J., dissents with an opinion.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED. THE FILING OF A MOTION FOR REHEARING SHALL NOT ALTER THE EFFECTIVE DATE OF THESE RULES.

Rule 1-4.1 is amended as follows:

1.4-1. Composition of board of governors, The board of governors shall be the governing body of the Florida Bar. It shall have fifty-one (51) members, fifty (50) of whom shall be voting members, and shall consist of the president and the president-elect of the Florida Bar, president and president-elect (who shall vote only in the absence of the president) of the Young Lawyers Division, three (3) representatives of the active members of the Florida Bar residing outside of the State of Florida, representatives elected by and from the active members of the Florida Bar in each judicial circuit, and two (2) residents of the State of Florida who are not members of the Florida Bar. There shall be one or more such circuit representatives from each judicial circuit who shall be apportioned among and elected from the judicial circuits on the basis of the number of members in good standing residing in each circuit. The formula for determining the number of additional circuit representtives apportioned to and elected from each judicial circuit and all other matters concerning election and term of office for members of the board of governors shall be prescribed in chapter 2.

Rule 2-3.3 is amended as follows:

2.3.3. Formula for apportionment of members of board of governors. The formula for determining the number of represen-

tatives apportioned to and elected from each judicial circuit shall be as follows:

(a) Determine the median number in good standing residing in the judicial circuits ("the median circuit population") (1) ranking the judicial circuits in order of the number of members in good standing residing in each circuit and (2) determining the number of members in good standing residing in the judicial circuit that is ranked exactly midway between the circuit with the largest number of members and the circuit with the smallest number of members or, if there is an even number of circuits, calculating the average membership of the two (2) circuits that are ranked midway between the circuit with the largest number of members and the circuit with the smallest number of members.

(b) Apportion representatives among the judicial circuits assigning to each judicial circuit the number of representatives equal to the quotient obtained by dividing the number of members in good standing residing in that circuit by the median circuit population and rounding to the nearest whole number.

(c) Determine the relative deviation of each circuit's proportionate representation from the median circuit population by (1) calculating the number of resident members per representative so apportioned, rounded to the nearest whole number, (2) subtracting from that number the median circuit population, (3) dividing the difference by the median circuit population, and (4) converting the quotient so obtained to the equivalent percentile.

(d) Determine whether each circuit's relative deviation from the median circuit population would be reduced by adding or subtracting one representative, and, if so, add or subtract one representative as indicated.

(e) Assign one representative to each judicial circuit not otherwise qualifying for a representative under the calculations made in subparagraphs (a) and (b).

(f) If the total number of representatives assigned to the judicial circuits as a result of the steps set forth in subparagraphs (a) through (e), when added to the number of officers and other representatives who are members of the board by virtue of the provisions of rule 1-4.1, would result in a board of more than fifty (50) voting persons, reduce the number of members of the board to exactly fifty (50) voting persons by (1) determining which judicial circuit among those to which more than one representative has been apportioned would have the smallest relative deviation from the median circuit population after the loss of one representative, (2) subtracting one representative from that circuit, and (3) repeating those two (2) steps as necessary until the total number of voting board members is reduced to exactly fifty (50).

BARKETT, J., dissenting.

The choice to be made here is between justice and fairness on the one hand and convenience and the traditional resistance to change on the other. Under the current apportionment system, the Board of Governors in December 1986 included one representative from the Third Circuit, which had only 117 members. In contrast, each of the six representatives from the Eleventh Circuit was charged with representing at-large a total of 8,255 members, or about 1,376 each. Not only is this unfair, but unlike the majority, I cannot conclude that any useful purpose is served by providing the membership of the Third Circuit more than ten times the representative power of their counterparts in the Eleventh.

As the United States Supreme Court noted in another context

> [t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.

Reynolds v. Sims, 377 U.S. 533, 555 (1964) (footnote omitted).

The principle of one person, one vote has become so firmly entrenched in this nation's idea of fair and representative governance that I see no reason why it should not be applied to The Florida Bar as a matter of policy.

The division of this state into judicial circuits has merit as a matter of administrative geographic convenience. The cost of basing bar representation on circuits, however, is the disenfranchisement of a substantial number of bar members practicing in Florida's population centers. That is too high a price to pay when one considers the broad spectrum of bar and public interest issues acted upon by the Board of Governors.

Thus, I would adopt in principal the proposal submitted to this Court by petitioner Chesterfield Smith and a number of other bar members. I would require the Bar to present to this Court a plan which would adequately provide the basis for one person, one vote representation

on the Board of Governors and refrain from any apportionment that dilutes the representative power of any distinct group of members.

Original Proceeding - Rules Regulating the Florida bar

Chesterfield Smith, Miami, Florida; Michael L. Rosen, Tallahassee, Florida; James H. Shrimberg, Jr., Tampa, Florida; and Alan B. Morrison and Cornish F. Hitchcock, Public Citizen Litigation Group, Washington, D.C.,

for Petitioners, Bar members

John F. Harkness, Jr., Executive Director, Tallahassee, Florida; Ray Ferrero, Jr., President, Fort Lauderdale, Florida; Rutledge R. Liles, President-elect, Jacksonville, Florida; D. Culver Smith, III, West Palm Beach, Florida; Paul F. Hill, General Counsel, Tallahassee, Florida; and Gregory P. Borgognoni and Peter W. Bellas, Miami, Florida; for Young Lawyers Division,

for Respondent, The Florida Bar

John R. Varney and Robert J. Hughes, Jr., Syracuse, New York; Talbot D'Alemberte, Dean, College of Law, Florida State University, Tallahassee, Florida; and Henry H. Harnage, Dade County Bar Association, Miami, Florida,

Intervenors, supporting Petition

Thomas M. Ervin, Jr., Tallahassee, Florida,

Intervenor, supporting the Florida Bar

Supreme Court of Florida

CORRECTED OPINION

No. 69,805

The Florida Bar re Amendments to the Rules Regulating the Florida Bar (Reapportionment).

[December 17, 1987]

On Motion for Clarification

PER CURIAM.

Our opinion in this case, filed December 10, 1987, is clarified as follows, at the request of the Florida Bar:

(1) The time for filing nominating petitons under rule 2-3.5(b) is extended from 5:00 p.m., January 10, 1988 to 5:00 p.m., February 1, 1988 for the nine newly created seats and for all "even numbered" seats on the board of governors.

(2) Rule 2-3.5(a) is amended to read as follows:

(a) Staggered terms. Elections shall be held in even-numbered years for the following representatives:

Circuit (Office Number)	Circuit (Office Number)
1	11(9)
2(2)	13(1)
3	14
4(1)	15(1)
6(1)	15(3)
7	17(1)
9(1)	17(4
9(3)	18
10	20
11(1)	
11(3)	nonresident (2)
11(5)	public member (2)
11(7)	

Elections shall be held in odd-numbered years for the following representatives:

Circuit (Office Number)	Circuit (Office Number)
2(1)	12(1)
4(2)	13(2)
5	15(2)
6(2)	16
6(3)	17(2)
8	17(3)
9(2)	19
11(2)	
11(4)	nonresident (1)
11(6)	nonresident (3)
11(8)	public member (1)
11(10)	

As additions or deletions of circuit representatives resulting from the application of the formula provided in this rule necessitate changes in the lists set forth above, both in circuit and office numbers, such changes shall be made by the executive director as appropriate and shall be published in the Florida Bar News.

It is so ordered.

McDONALD, C.J., and OVERTON, EHRLICH, SHAW, BARKETT, GRIMES and KOGAN, JJ., Concur

Original Proceeding - Rules Regulating the Florida Bar

Chesterfield Smith, Miami, Florida; Michael L. Rosen, Tallahassee, Florida; James H. Shimberg, Jr., Tampa, Florida; and Alan B. Morrison and Cornish F. Hitchcock, Public Citizen Litigation Group, Washington, D.C.,

for Petitioners, Bar members

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for Respondent, The Florida Bar

John R. Varney and Robert J. Hughes, Jr., Syracuse, New York; Talbot D'Alemberte, Dean, College of Law, Florida State University, Tallahassee, Florida; and Henry H. Harnage, Dade County Bar Association, Miami, Florida,

Intervenors, supporting Petition

Thomas M. Ervin, Jr., Tallahassee, Florida,

Intervenor, supporting the Florida Bar

JUDGMENT APPEALED FROM

Appellants have been informed by the Office of the Clerk of the Supreme Court of Florida that no separate Judgment or Order will be entered in this action. The Decision and Order of the Supreme Court of Florida appealed from has previously been set forth in this Appendix.

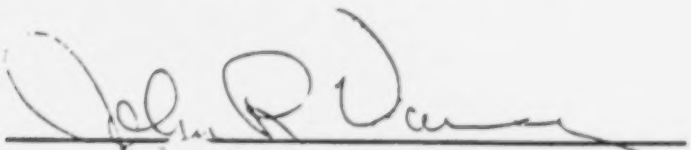
IN THE SUPREME COURT OF THE STATE OF FLORIDA

THE FLORIDA BAR re AMENDMENTS OF THE RULES REGULATING THE FLORIDA BAR (REAPPORTIONMENT)

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Intervenors John R. Varney and Robert J. Hughes, the Appellants in the above-captioned matter, hereby appeal to the Supreme Court of the United States from the final order of this Court reappointing The Board of Governors of the Florida Bar, entered herein on December 10, 1987 and from the Order of Clarification entered herein on December 17, 1987.

This appeal is taken pursuant to 28 U.S.C. §1257(2).



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Filed March 15, 1988 in
Supreme Court Florida

STATEMENT PURSUANT TO RULE 28.4(c) OF THE RULES OF THE SUPREME COURT

Pursuant to Rule 28.4(c) of the Rules of the Supreme Court, Appellants state that 28 U.S.C. §2403(b) may be applicable and that three (3) copies of this Jurisdictional Statement have been served on the Attorney General of the State of Florida. To Appellant's knowledge, the Supreme Court of Florida has not certified to the Attorney General of Florida the fact that the constitutionally of sections 1-4.1 and 2-3.3 of the Rules Regulating the Florida Bar was drawn in question.

(2)

Supreme Court, U.S.
FILED
APR 20 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1653

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JOHN R. VARNEY and ROBERT J. HUGHES, JR.,
Appellants,

vs.

THE FLORIDA BAR, *et al.*,
Appellees.

ON APPEAL FROM
THE SUPREME COURT OF FLORIDA

MOTION TO DISMISS OR AFFIRM

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April 20, 1988

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QUESTIONS PRESENTED

Whether the Supreme Court of Florida erred in holding that the principle of "one person, one vote" does not apply to elections of The Florida Bar Board of Governors.

If the principle of "one person, one vote" is applicable to elections of The Florida Bar Board of Governors, whether that principle is equally applicable to nonresident members of The Florida Bar as well as resident members.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No.

JOHN R. VARNEY and ROBERT J. HUGHES, JR.,
Appellants,

vs.

THE FLORIDA BAR, *et al.*,
Appellees.

ON APPEAL FROM
THE SUPREME COURT OF FLORIDA

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16, Rules of the Supreme Court of the United States, Appellee The Florida Bar moves to dismiss this appeal or to affirm the decision of the Supreme Court of Florida for want of jurisdiction of this Court under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This appeal raises questions whether an amendment made by the Supreme Court of Florida to its Rules Regulating The Florida Bar is violative of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution with respect to apportionment of the governing board of that integrated state bar.

Appellants' Jurisdictional Statement cites the former rules on apportionment of The Florida Bar Board of Governors, at J.S. 2-4. The appendix to Appellants' Jurisidictional Statement, at J.S. A-7 to A-9 & A-13, sets forth the present rules on this subject as promulgated by the Supreme Court of Florida in the rulemaking proceeding appealed from in this action (App. A & C).

STATEMENT OF THE CASE

This proceeding began with a petition seeking amendments to the Rules Regulating The Florida Bar, filed in the Supreme Court of Florida because of its exclusive jurisdiction over that integrated state bar under Article V, Section 15 of The Florida Constitution.

The action was initiated on December 24, 1986 by a group of Bar members who sought changes to certain rules of the Supreme Court of Florida which specified how the Bar's Board of Governors was elected. At that time, the Bar's 42-member Board was composed of: one member elected from each of Florida's 20 judicial circuits; 14 additional circuit representatives elected from the state's more populous circuits; the President and President-elect of The Florida Bar; the President and President-elect of the Bar's Young Lawyers Division; two out-of-state Bar members; and two nonlawyer "public" members.

The original petition advocated a revised rule provision for reapportionment of The Florida Bar's Board of Governors whereby existing circuit representatives chosen by in-state Bar members would be elected according to the principle of "one lawyer, one vote." Among other features, the initial proposal made no provision for additional Board members to represent nonresident Bar members. The suggested rule

amendments were urged on the basis of public policy and this Court's interpretation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution in various "one person, one vote" decisions.

Consistent with its practice in Bar rules matters, The Supreme Court of Florida allowed interested parties to participate in this proceeding. In addition to the original petitioners and The Florida Bar, the state supreme court received comments and memoranda from five other parties: The Florida Bar's Young Lawyer Division; one local bar association; a law school dean; one incumbent member of the Bar's Board of Governors; and the two nonresident members of The Florida Bar who are the appellants in this case. From within this group of seven separate parties, there were at least five distinctive proposals for amending the selection process and composition of The Florida Bar's Board of Governors.

Appellants generally argued that the "one person, one vote" requirement of the Fourteenth Amendment applied to the Board of Governors of The Florida Bar, and that important considerations of equity and fairness compelled the conclusion that such principle should apply equally to both resident and nonresident Bar members.

The Florida Bar maintained that reapportionment of its Board was not constitutionally required but submitted a proposal which increased the number of in-state circuit representatives elected by lawyers residing in the more populous areas and which added a third Board representative for the organization's out-of-state members.

On December 10, 1987, the Supreme Court of Florida amended its rules on apportionment of The Florida Bar Board of Governors, adopting a reapportionment formula consistent with that proposed by The Florida Bar. The Court's enabling

opinion indicated that the Board of Governors "should be apportioned fairly and should represent all of the Bar's members" (J.S. A-3). The court observed, however, that it was not required to apportion the Bar's Board in strict conformity with this Court's "one person, one vote" decisions, noting that they were inapplicable to a specialized entity such as The Florida Bar whose "powers are limited and directly affect members of a particular group, i.e., persons licensed to practice law in this state" (J.S. A-4).

On December 17, 1987, the Florida Supreme Court issued further clarifying amendments to its earlier opinion, making minor changes in the Board nomination and election process. Appellants filed a notice of appeal from this action, asserting jurisdiction with this Court under 28 U.S.C. §1257(2).

REASON FOR DISMISSAL OR AFFIRMATION

THIS ACTION SEEKS TO APPEAL AN AMENDMENT MADE BY THE SUPREME COURT OF FLORIDA TO ITS RULES REGULATING THE FLORIDA BAR, AND THIS COURT HAS NO JURISDICTION UNDER 28 U.S.C. §1257 TO REVIEW SUCH MATTERS RESULTING FROM A STATE COURT'S RULEMAKING PROCEEDINGS.

Under the terms of 28 U.S.C §1257, this Court's jurisdiction may be invoked to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." Appeal is appropriate under 28 U.S.C. §1257(2) in any such matter "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution . . . and the decision is in favor of its validity." This appeal should be dismissed for nonconformity with both these provisions of the statute, which must be construed narrowly in the absence

of clear congressional intent to enlarge this Court's mandatory jurisdiction. *Key v. Doyle,* 434 U.S. 59,65 (1977).

The action of the Supreme Court of Florida in this case was no "judgment" or "decree" for purposes of 28 U.S.C. §1257, but merely the exercise by a state supreme court of its authority to amend its rules which regulate The Florida Bar as an official arm of that tribunal. Appellate jurisdiction of the United States Supreme Court does not embrace any direct appeal from such a rulemaking proceeding.

This court's opinion in *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462 (1983) provides clear guidance that this appeal should be dismissed for want of jurisdiction. *Feldman* emphasizes that an appeal premised on 28 U.S.C. § 1257 is appropriate only if the state court proceedings at issue were "judicial" in nature. Quoting from its opinion in *Prentis v. Atlantic Coast Line Co.,* 211 U.S. 210, 226 (1908), this Court in *Feldman* emphasized:

> A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end.

460 U.S. at 477.

The questioned action of the Supreme Court of Florida in this case was clearly a rulemaking proceeding initiated to amend certain provisions within the Rules Regulating The Florida Bar. Because that action sought review of a then-existing Bar rule and resulted in the adoption of a successor provision, it is further questionable whether the proceedings below could be properly characterized as having "drawn in question the validity of a statute" for purposes of 28 U.S.C. § 1257 when the statute at issue did not exist until rendition of the state court opinion which promulgated it.

This Court clarified the distinction between judicial and certain nonjudicial acts by reciting its analysis of rail passenger ratemaking in *Prentis*, quoted within the *Feldman* case:

> Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is making of a rule for the future, and therefore is an act legislative not judicial in kind.
>
> 460 U.S. at 477.

Furthermore, this Court has recognized that state supreme courts act in a nonjudicial, legislative capacity in promulgating rules regulating the bar. *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 731 (1980). The fact that the proceedings in which the appellants participated were conducted before the Supreme Court of Florida, in some adversarial manner, is not determinative; the nature and effect of the proceedings are controlling.. *In re Summers*, 325 U.S. 561, 566-7 (1945).

Appellants' involvement in the proceedings below, among appearances by others, was pursuant to Supreme Court of Florida rule which permitted the participation of interested parties on any petition regarding Bar rule amendments. Article XIII (Amendments), Integration Rule of The Florida Bar (App. D); Rule 1-12.1 (Amendments to rules; notice), Rules Regulating The Florida Bar (App. B).[1] In pleadings submitted to that court,

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[1]A substantially reformatted "Integration Rule of The Florida Bar," adopted by the Supreme Court of Florida in July of 1986, became effective on January 1, 1987. The original petition in the instant appeal was filed prior to the effective date of the restyled "Rules Regulating The Florida Bar" but sought amendment of the Board apportionment formula within the new rules. The amendment process under both sets of Bar rules allowed for participation by interested parties, and the Board's apportionment formula was the same under each rules compilation.

appellants proposed amendments of general applicability; they sought no particularized relief. Although appellants raised constitutional and public policy issues in their argument, it was done in the context of rulemaking.

Appellants cite three cases in support of their premise that jurisdiction of this Court is appropriate under 28 U.S.C. §1257(2): *Ohralik v. Ohio State Bar Ass'n*, 463 U.S. 447 (1978); *In re Primus*, 436 U.S. 412 (1978); and *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). In all these actions wherein this Court considered the constitutionality of state court rules regulating the legal profession, a lower court had made a particularized adjudication as to the impact of specific rules on an individual lawyer party.

This attempted appeal does not present this Court with a particularized dispute upon which its judicial power can act. Rather, it reflects "a desire for an abstract declaration of the law." *In re Summers*, 325 U.S. 561, 567 (1945). Appellants seek a direct appeal to this Court for essentially its advisory opinion regarding varying sets of legislative proposals. There is no "case" or "controversy" for purposes of Article III, Section 2 of the United States Constitution, so no appeal should be taken. *Rapp v. Committee on Professional Ethics & Conduct*, 504 F.Supp. 1092 (S.D. Iowa 1980).

Appellants challenge an amended state bar rule yet to be directly reviewed in a separate judicial proceeding. Their unnecessary recitation of the former Florida Bar rule on this subject, found within Appellants' Jurisdictional Statement at J.S. 2-4, is illustrative of the precise jurisdictional problem in such actions noted by the District Court in *Rapp*.

> If an appeal had been attempted, the United States Supreme Court would not have been presented with a particularized dispute upon which its judicial po-

> could act; rather, it would have been presented with two sets of legislative proposals. There was no "case" or "controversy," see U.S. Const. art. III, §2, so no appeal could be taken.
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> 504 F.Supp. at 1098.

This Court's guidance in *Feldman* is emphatic that the appropriate forum for appellants' constitutional claim lies elsewhere.

> Challenges to the constitutionality of state bar rules, therefore, do not necessarily require a United States district court to review a final state-court judgment in a judicial proceeding. Instead, the district court may simply be asked to assess the validity of a rule promulgated in a nonjudicial proceeding. If this is the case, the district court is not reviewing a state court judicial decision. In this regard, 28 U.S.C. §1257 does not act as a bar to the district court's consideration of the case and because the proceedings giving rise to the rule are nonjudicial the policies prohibiting United States district court review of final state-court judgments are not implicated.
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> 460 U.S. 483, 486.

CONCLUSION

This appeal should be dismissed for lack of jurisdiction under 28 U.S.C. § 1257. Because the state court proceedings in question were nonjudicial in nature, there is no judgment or decree to alternatively support a petition for writ of certiorari under 28 U.S.C. § 2103.

Respectfully submitted,

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APPENDIX A

Rule 1-4.1, Rules Regulating The Florida Bar

1-4.1 *Composition of board of governors.* The board of governors shall be the governing body of The Florida Bar. It shall have fifty-one (51) members, fifty (50) of whom shall be voting members, and shall consist of the president and the president-elect of The Florida Bar, president and president-elect (who shall vote only in the absence of the president) of the Young Lawyers Division, three (3) representatives of the active members of The Florida Bar residing outside of the State of Florida, representatives elected by and from the active members of The Florida Bar in each judicial circuit, and two (2) residents of the State of Florida who are not members of The Florida Bar. There shall be one or more such circuit representatives from each judicial circuit who shall be apportioned among and elected from the judicial circuits on the basis of the number of members in good standing residing in each circuit. The formula for determining the number of additional circuit representatives apportioned to and elected from each judicial circuit and all other matters concerning election and term of office for members of the board of governors shall be prescribed in chapter 2.

APPENDIX B

Rule 1-12.1, Rules Regulating The Florida Bar

1-12.1 *Amendment to rules; notice.* Petitions for revision of or amendments to these Rules Regulating The Florida Bar, other than chapters 2, 7, and 9, will be entertained by this Court when presented by the board of governors or by not fewer than fifty (50) active members of The Florida Bar. Notice of intention to file such petition on a specified date together with a copy of the proposed amendment shall be published in The Florida Bar *News* not less than thirty (30) days prior to the filing of such petition. The Court will thereafter accept objections or comments on such petition.

APPENDIX C

Rule 2-3.3, Rules Regulating The Florida Bar

2-3.3 *Formula for apportionment of members of board of governors.* The formula for determining the number of representatives apportioned to and elected from each judicial circuit shall be as follows:

(a) Determine the median number of members in good standing residing in the judicial circuits ("the median circuit population") by (1) ranking the judicial circuits in order of the number of members in good standing residing in each circuit and (2) determining the number of members in good standing residing in the judicial circuit that is ranked exactly midway between the circuit with the largest number of members and the circuit with the smallest number of members or, if there is an even number of circuits, calculating the average membership of the two (2) circuits that are ranked midway between the circuit with the largest number of members.

(b) Apportion representatives among the judicial circuits by assigning to each judicial circuit the number of representatives equal to the quotient obtained by dividing the number of members in good standing residing in that circuit by the median circuit population and rounding to the nearest whole number.

(c) Determine the relative deviation of each circuit's proportionate representation from the median circuit population by (1) calculating the number of resident members per representative so apportioned, rounded to the nearest whole number, (2) subtracting from that number the median circuit population, and (4) converting the quotient so obtained to the equivalent percentile.

(d) Determine whether each circuit's relative deviation from the median circuit population would be reduced by adding or subtracting one representative, and, if so, add or subtract one representative as indicated.

(e) Assign one representative to each judicial circuit not otherwise qualifying for a representative under the calculations made in subparagraphs (a) and (b).

(f) If the total number of representatives assigned to the judicial circuits as a result of the steps set forth in subparagraphs (a) through (e), when added to the number of officers and other representative who are members of the board by virtue of the provisions of rule 1-4.1, would result in a board of more than fifty (50) voting persons, reduce the number of members of the board to exactly fifty (50) voting persons by (1) determining which judicial circuit among those to which more than one representative has been apportioned would have the smallest relative deviation from the median circuit population after the loss of one representative, (2) subtracting one representative from that circuit, and (3) repeating those two (2) steps as necessary until the total number of voting board members is reduced to exactly fifty (50).

APPENDIX D

Article XIII, Integration Rule of The Florida Bar (1986)

Amendments. Petitions for revision of, or amendments to, this rule will be entertained by the Supreme Court when presented by the Board of Governors or by not less than 25 active members of The Florida Bar. Notice of the filing of the petition shall be published in an issue of The Florida Bar *News* and it will proceed as an original proceeding under Florida Appellate Rules 9.030(a)(3) and 9.100. Except in an emergency, the court will not act on the petition within 20 days after the date of the publication. The court may upon good cause shown, waive the formal nature of the proceeding under the appellate rules and specify by order an informal procedure to be followed for such consideration including a means for interested parties to participate and be heard.